

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LORILLARD TOBACCO COMPANY, a
Delaware corporation,

Plaintiff,

v.

SERVE WELL MARKET, a business entity;
ASAD SHARMOUG, an individual; TAMIN
NAJARR, an individual; and DOES 1-10
inclusive,

Defendant.

No. C 05-3121 SI

**ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGEMENT**

Defendants have filed a motion for summary judgement. Pursuant to Civil Local Rule 7-1(b), the Court finds that it is appropriate to determine the motion without oral argument and VACATES the hearing set for January 20, 2006. Having carefully considered the arguments of the parties as well as the evidence submitted, the Court hereby DENIES defendants' motion.

BACKGROUND

Plaintiff Lorillard Tobacco Company ("Lorillard") alleges that defendants Serve Well Market ("Serve Well"), Asad Sharmoug, and Tamin Najarr sold or offered for sale counterfeit imitations of Lorillard cigarettes in violation of 15 U.S.C. §§ 1114(1), and 1125(c); Cal. Bus. and Prof. Code §§ 14330 and 17200; and common law unfair competition. Lorillard filed its Complaint against defendants on August 1, 2005 after its sales representatives allegedly discovered such counterfeit items on June 22, 2005. Decl. of Thomas A. Burg ("Burg Decl.") at ¶¶ 2, 3, 4, and 5, Exhs. A, B, and C.

On August 2, 2005, this Court issued a Seizure Order, a Temporary Restraining Order, an Order

1 to Show Cause for Preliminary Injunction, and an Order Accelerating Discovery. Together with the
 2 U.S. Marshals' Service, plaintiff served the Seizure Order on August 8, 2005 and obtained two packs
 3 of allegedly counterfeit cigarettes. *Id.* at ¶ 2. Pursuant to the Order Accelerating Discovery, on August
 4 6, 2005, plaintiff served defendants with interrogatories and document requests. *Id.* at ¶ 7. Defendants
 5 responded to the interrogatories on September 3, 2005, and answered Lorillard's Complaint on
 6 November 14, 2005. *Id.* at ¶ 12. However, according to plaintiff, defendants have not yet fully produced
 7 all documents pursuant to discovery requests. Lorillard specifically asserts that defendants' production
 8 of purchase receipts for 2001, 2002 and 2003 appears to be incomplete. Burg Decl., ¶ 11. Neither party
 9 has taken depositions in this case.¹

11 LEGAL STANDARD

12 Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories,
 13 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
 14 material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.
 15 56(c).

16 In a motion for summary judgment, "[if] the moving party for summary judgment meets its
 17 initial burden of identifying for the court those portions of the materials on file that it believes
 18 demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so
 19 that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts
 20 showing that there is a genuine issue for trial." *See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors*
 21 *Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 317
 22 (1986)). In judging evidence at the summary judgment stage, the Court does not make credibility
 23 determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the
 24 non-moving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v.*

26 ¹ Although defendants did not file a reply by the January 6, 2006 deadline, they did submit an
 27 "Amended Disclosure to Plaintiff's Opposition to Defendant's Request for Summary Judgement Sua
 28 Sponte Entry of Summary Judgment/ Summary Adjudication" on January 12, 2006. While defendants' filing indicates their intention to produce additional documents, it provides no additional legal support for their motion.

1 *Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).
 2 The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory,
 3 speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and
 4 defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. G.T.E. Corp.*, 594 F.2d 730, 738 (9th Cir.
 5 1979).

6 7 DISCUSSION

8 The Court concludes that defendants have failed to demonstrate that summary judgement is
 9 appropriate. Defendants' sole argument in their motion is that they could not be reasonably expected
 10 to know that the products were not genuine since the items originated from a wholesaler, Geary
 11 Wholesale Company. In support, defendants submit twenty-seven invoices from 2005 as evidence that
 12 they have indeed purchased products from Geary Wholesale Company. *Id.* at 3. The problem with
 13 defendants' argument is that intent is not an "essential" element of the statutory provisions allegedly
 14 violated. 15 U.S.C. § 1114 is a strict liability statute, meaning that ignorance that the products were not
 15 genuine is not a defense. *See Phillip Morris USA, Inc. v. Shalabi, et al.*, 352 F. Supp. 2d 1067, 1073-74
 16 (C.D. Cal. 2004) (citing *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143,
 17 1152 n.6 (7th Cir. 1992) ("Sellers bear strict liability for violations of the Lanham Act."); *Taubman Co.*
 18 *v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003) ("[T]he Lanham Act is a strict liability statute.").

19 Similarly, strict liability is imposed for violations of Cal. Bus. and Prof. Code § 17200. *See*
 20 *Hewlett v. Squaw Valley Ski Corp.* 54 Cal. App. 4th 499, 520 (Cal. Ct. App. 1997) ("[§ 17200] imposes
 21 strict liability. It is not necessary to show that the defendant intended to injure anyone."). Consequently,
 22 even if defendants were able to demonstrate lack of intent, such a showing would not negate a necessary
 23 element of the allegation and thus, would not satisfy the burden of production.

24 Moreover, although under no obligation to do so at this point, Lorillard offers evidence that the
 25 cigarettes seized at Serve Well Market were counterfeit. Plaintiff has submitted the declaration of
 26 Thomas A. Burg, plaintiff's attorney, who was present at Serve Well Market on August 8, 2005 when
 27 Lorillard executed a seizure order and allegedly obtained two packs of counterfeit Newport Box King
 28 cigarettes. *See* Burg Decl. at ¶ 2. Plaintiff also has submitted declarations from three of its employees

1 who have examined the items and determined them to be counterfeit. *Id.* at Exs. A-C. At the very least,
2 plaintiff has submitted evidence raising a triable issue of fact sufficient to defeat summary judgment.

3
4 **CONCLUSION**

5 Based on the foregoing, the Court DENIES defendants' motion for summary judgment. (Docket
6 No. 29).

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8 **IT IS SO ORDERED.**

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10 Dated: January 13, 2006

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SUSAN ILLSTON
13 United States District Judge
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